hearing, Dr. Soderstrand was sentenced to thirty-five (35) months imprisonment with three years supervised release, 104 hours of community service, and a $100.00 assessment.

Dr. Soderstrand filed Notice of Appeal on January 16, 2004, and the United States Court of Appeals for the Tenth Circuit affirmed on June 16, 2005. *United States v. Soderstrand*, 412 F.3d 1146 (10th Cir. 2005).

II. STATEMENT OF THE FACTS.

The evidence relied upon by the Government in the prosecution of Dr. Soderstrand was seized by law enforcement from Dr. Soderstrand's safe on July 10, 2002. The search was conducted pursuant to a search warrant issued by Payne County, Oklahoma, magistrate Phillip Corley, based upon information contained in an Affidavit signed on July 10, 2002, by Larry Crites, an investigator with the Oklahoma State University Police Department (the campus police).

The safe came to the attention of law enforcement through the actions of Doris Al-Harake who, like Dr. Soderstrand, was an employee of Oklahoma State University. On July 3 or 4, 2002, Al-Harake, a secretary at the College of Electrical and Computer Engineering, accessed Room 205, a supply room for the Engineering Department. While in the supply room for some other purpose, she spied "a gray, fireproof safe sitting behind a punch bowl on some boxes." According to the Affidavit for Search Warrant, Al-Harake claimed that the key was in the lock of the safe when she found it.[3] She stated that an informal inquiry had been conducted in the

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[3] Dr. Soderstrand disputed Al-Harake's contention that the key was in the safe.

Department earlier in the year in an attempt to ascertain the owner of the safe, but to no avail.

On this occasion, she decided to open the safe in order to look at the contents to possibly ascertain the identity of the owner. The safe contained the following items: three compact discs, five Polaroid photos, twenty-seven 35mm photos, four personal letters, and sixty-three 3.5 diskettes. One of the letters was dated May 26, 1987, and the heading on the personal letter read, "Dear Michael." A second letter was in an envelope addressed to Dr. Michael Soderstrand, had a salutation that read, "Dear Michael," and provided a physical address. A third letter dated May 17, 1987, was written on University of California at Davis letterhead and was in an envelope marked, "Private Document To Be Opened Only By Helen or Mike or Me," and was signed, "M. Soderstrand." There were also two photographs of Dr. Soderstrand.

At the time Mrs. Al-Harake was pilfering through the contents of the safe, Dr. Michael Soderstrand was the Department head for the College of Electrical and Computer Engineering and worked in the same Department as Mrs. Al-Harake. Apparently unable to determine the identity of the owner of the safe, despite the *letters* and *photographs* showing that Dr. Soderstrand's personal effects were in the safe, Al-Harake removed one of the compact discs from the safe and read the data on her office computer. She observed one image stored on the disc that appeared to depict nude, Asian children 10-12 years of age.

After looking at the contents of the disc, she returned the disc to the safe in the supply room and subsequently made efforts to alert anonymously the authorities at Oklahoma State University to what she viewed. These efforts included

registering for free e-mail accounts under a pseudonym and sending anonymous e-mail messages to Karl Reid, the Dean of the College of Engineering. Mrs. Al-Harake sent two e-mails, one on July 5, 2002, and then another on July 6, 2002.

Karl Reid received the two e-mails on or about July 8, 2002, and forwarded them to the Chief of the campus Police Department, Everett Eaton. The next day, July 9, 2002, Chief Eaton dispatched Officer Larry Crites to meet with Reid at the College of Engineering. Crites, along with another college official, retrieved the safe from the supply room. Crites thereafter took custody of the safe and transported it to the evidence locker at the campus police department. The safe was locked and there was no key in the lock as allegedly found by Mrs. Al-Harake.

The next day, July 10, 2002, one week after Mrs. Al-Harake looked inside the safe, Officer Crites swore an Affidavit in support of a search warrant for the safe. The *only* language in his Affidavit that could arguably be used to form the basis for a search for contraband is in the form of third party hearsay where Officer Crites relayed to Magistrate Corley statements by Al-Harake told to Dean Reid, and then relayed in turn to Officer Crites:

> On the CD Al-Harake saw a [sic] image (photo) with several Asian persons that appeared to Al-Harake to be around 10-12 years of age. In this image the Asian children were nude and did not have any pubic hair on their genital area.

Based ***solely*** upon this information, the state court Magistrate issued a search warrant authorizing law enforcement to search the contents of the safe. Because the safe was locked, and

even though Mrs. Al-Harake *claimed* to have a key, Officer Crites required the services of the Oklahoma State University Key Shop to open the safe and reveal the contents. The contents of the safe formed the evidentiary basis for the subsequent criminal prosecution of Dr. Soderstrand.

III. DESCRIPTION OF THE CONSTITUTIONAL ISSUES.

Dr. Soderstrand's case presents three topical and important constitutional questions: **1)** what exactly constitutes a "state actor" or a "government actor" for purposes of invoking the Fourth Amendment? **2)** Do the policy considerations undergirding the "good faith" exception to the warrant requirement in *United States v. Leon*, 468 U.S. 897 (1984) conflict with the First Amendment in cases where the materials *described* in the affidavit are protected on their face? and **3)** when a sentencing court imposes sentence in a clearly unconstitutional manner in violation of this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), is a limited remand necessary in order to determine whether plain error occurred?

A. WHAT IS A "GOVERNMENT ACTOR?"

What is a "state actor" or "government actor" for purposes of the Fourth Amendment? This Court has long-held, at least since 1921, that the Fourth Amendment acts as a restraint upon governmental action against a private citizen:

> The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, ***its protection applies to governmental action***. Its origin and history clearly show that it was intended as a

> ***restraint upon the activities of sovereign authority***, and was ***not intended to be a limitation upon other than governmental agencies***; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.

Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (emphasis added); *see also O'Connor v. Ortega*, 480 U.S. 709, 714-25 (1987); *accord United States v. Souza*, 223 F.3d 1197, 1201 (10th Cir. 2000). This Court has extended the protections of the Fourth Amendment to restrict *state* action in addition to the actions of the federal government *via* the Fourteenth Amendment. *O'Connor*, 480 U.S. at 714.

In fact, this Court has recognized that searches and seizures by government employers or supervisors of the private property of their employees are subject to the restraints of the Fourth Amendment. *Id.* at 714-15; *see, e.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325, 334-35 (1985) (school officials); *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) (building inspectors); and *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312-13 (1978) (OSHA inspectors).

The cases of this Court make clear that in the context of state and federal government employment and workplace areas, the guiding principle under the Fourth Amendment is "reasonableness" and such protections under the Fourth Amendment are implicated where government employees infringe upon "an expectation of privacy that society is prepared to consider reasonable." *O'Connor*, 480 U.S. at 715 (*citing United States v. Jacobsen*, 466 U.S. 109, 113

(1984)). In other words, an individual, such as Dr. Soderstrand, does "not lose Fourth Amendment rights merely because they work for the government instead of a private employer." *O'Connor*, 480 U.S. at 717.

In this case, both Doris Al-Harake and Dr. Soderstrand were employees of the State of Oklahoma. The Tenth Circuit, while recognizing that Al-Harake was an employee of the government, nevertheless held that in this case she was "acting solely on her own account" and, as such, the Circuit equated her actions to those of a non-government actor and therefore applied a two-pronged test used in the Tenth Circuit to determine whether the actions of private actors can be considered government actions: 1) whether the Government knew of and acquiesced in the intrusive conduct, and 2) whether the person searching intended to assist law enforcement efforts or to further his own ends." *Soderstrand*, 412 F.3d at 1153 (*citing United States v. Souza*, 223 F.3d 1197, 1201 (10th Cir. 2000)).

Application of the *Souza* two-pronged test under the facts of Dr. Soderstrand's case imposes a *much more stringent* burden on a defendant than this Court's precedents dictate; and, moreover, the Tenth Circuit's requirement that a government employee show that a fellow employee (such as Doris Al-Harake in this case) intended to assist law enforcement is clearly inconsistent with this Court's precedents holding that the Fourth Amendment applies to the governmental workplace *perforce* and that the inquiry is the reasonableness of an employee's expectation of privacy in a given instance, *not* the subjective intent of the government employee executing the search to assist the police.

Thus, the issue presented in this Petition is one of fundamental constitutional construction of the Fourth

Amendment as it protects government employees. The Tenth Circuit has departed *markedly* from this Court's precedents in the way it applies the protections of the Fourth Amendment and in a manner that severely curtails the ability of an accused such as Dr. Soderstrand to seek its protections.

B. DOES THE FIRST AMENDMENT IMPACT *LEON*?

This Court has implemented the "good faith" doctrine to save otherwise defective search warrants from the ravages of the exclusionary rule. *See United States v. Leon*, 468 U.S. 897 (1984). However, as the Second Circuit has stated eloquently, the "good faith" doctrine in *Leon* "is not a magic lamp for police officers to rub whenever they find themselves in trouble." *United States v. Reilly*, 76 F.3d 1271, 1280 (2nd Cir. 1996).

Moreover, the principle in *Leon* does not apply to save a warrant in four situations: 1) in issuing the warrant, the magistrate relied on an affidavit that was deliberately or recklessly false; 2) the magistrate failed to act in a neutral or detached manner; 3) the warrant was based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; or 4) the warrant was so facially deficient that an officer could not reasonably have believed it to be valid. *Leon*, 468 U.S. at 922-23.

Dr. Soderstrand urged suppression in the courts below on the basis that the affidavit in support of the search warrant was plainly insufficient to support a probable cause finding. *See* Appendix at 8a-10a. Although purporting to find the warrant valid, the Tenth Circuit nevertheless held that *Leon* applied in any event because the police officers "did

everything they were supposed to do." *See* Appendix at 10a, 13a.

The officers may have done everything they were supposed to do, but Dr. Soderstrand urges this Court to review the legal principles applicable to the case to determine whether the federal courts did everything they were supposed to do. This Court has held that search warrant applications seeking materials that are presumptively protected by the First Amendment must be evaluated under the same probable cause standard used to review warrant applications generally. *New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986).

Soderstrand asks this Court to determine whether and if the First Amendment impacts the analysis under *Leon*, particularly in a case such as this one where the affidavit itself is bare-bones and clearly insufficient to establish probable cause. The warrant relayed facts describing purely constitutionally protected material (*i.e.*, a description of nude persons who appear to be young does not describe material that is illegal to possess because the nudity must be depicted in a lascivious manner in order to be criminal). *United States v. Horn*, 187 F.3d 781, 789 (8th Cir. 1999); *United States v. Villard*, 885 F.2d 117, 124 (3rd Cir. 1989).

Dr. Soderstrand urges this Court to consider that the First Amendment, although not altering the quantum of analysis necessary to support the probable cause determination, must temper any subsequent analysis under *Leon*. There are clear policy reasons suggesting that such a mode of analysis is desirable, chief among them being that the warrant application is generated by the police officers themselves and any drafting deficiencies in the affidavit are tied directly to the actions of the officers and not the courts. Thus, officer "good faith" is tied directly to the officer's own actions.

C. DOES A FINDING OF PLAIN ERROR REQUIRE A LIMITED REMAND?

The federal circuit courts of appeals have been inconsistent in applying the plain error standards in the wake of this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). In the case of Dr. Soderstrand, this Court decided *Booker* the day after oral argument before the Tenth Circuit panel that decided the case. Appendix 4a. Thus, because his case was pending on direct appeal, the Circuit applied *Booker*, but only insofar as *Booker* error could be considered plain error.

The Circuit conceded that "here there is error and it is plain." Appendix 15a. However, the Circuit refused to remand to the district court for re-sentencing in light of circuit precedent establishing that plain error review does not require remand and the circuit held ultimately that Dr. Soderstrand failed to meet the fourth plain error prong (*i.e.*, that the error affected the fairness, integrity, or public reputation of the judicial proceedings). Appendix 17a. Dr. Soderstrand asserts that the analysis engaged in by the Tenth Circuit fails to confer proper respect to the constitutional error recognized under *Booker* and that remand to the District Court is proper.

REASONS FOR GRANTING THE WRIT

The constitutional issues raised in this Petition impact, on a day-to-day basis, every single employee who goes to work in the United States for a state, local, or the federal government; every search warrant application seeking facially protected materials; and the proper administration of this Court's watershed decision in *Booker*. Each of these issues has been developed in the Tenth Circuit below and guidance

from this Court is needed to ensure the proper administration of the Fourth and Sixth Amendments in this country.

I. MILLIONS OF GOVERNMENT EMPLOYEES ARE AFFECTED

Uncle Sam employs over 2,704,000 workers and hires an average of 300,000 new employees each year.[4] According to United States Department of Labor, Bureau of Labor statistics, state and local governments provide their constituents with vital services, such as transportation, public safety, health care, education, utilities, and courts; the result is that, excluding education and hospitals, *state and local governments* employ about 7.9 million workers, placing them ***among the largest employers in the economy***.[5] Seven out of ten of these employees work for ***local*** governments, such as counties, cities, special districts, and towns.

The scope of the number of government workers, and the corresponding relevance of the constitutional issues involved in this case, is staggering. In addition to the 50 State governments, there are about 87,500 local governments according to the U.S. Census Bureau. These include about 3,000 county governments; 19,400 municipal governments; 16,500 townships; 13,500 school districts; and 35,100 special districts (Illinois had the most local government units, with more than 6,900; Hawaii had the fewest, with 20).

Protecting ***all*** of these government workers at the workplace is the Fourth Amendment; all government workers

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[4] *See* http://federaljobs.net/overview.htm.

[5] *See* http://www.bls.gov/oco/cg/cgs042.htm.

except, of course, those working within the states comprising the Tenth Circuit. The Tenth Circuit's doctrinal understanding of this Court's extant jurisprudence governing Fourth Amendment issues in the government workplace is seriously flawed and imposes greater restrictions----and thus much lesser protections----upon the aggrieved employee to show the employee was subject to a criminal investigation (which arguable Soderstrand could have made such a showing in this case) and that the government co-worker was motivated by such an investigation to snoop into the private effects of others in the workplace.

The decisions of this Court do not require such a showing; rather, a government employee such as Dr. Soderstrand must merely demonstrate a reasonable expectation of privacy in order to avail himself of the constitutional protections accorded any other citizen. *See O'Connor*, *supra*. This Court must grant certiorari and re-direct the Tenth Circuit's Fourth Amendment jurisprudence so that it is in-line with this Court's authority.

II. *LEON* SHOULD BE RE-VISITED AND LIMITED

The interaction between the First Amendment and the "good faith" principle found in *Leon* deserves consideration by this Court. In this case, the affidavit in support of the search warrant described items presumptively protected by the First Amendment. Such imprecise and/or ambiguous language in warrant affidavits are controlled not by the courts, but by the drafters of the affidavits—the police officers. *Leon* focuses upon the reliance of the officers upon the judgment of the presumably neutral and detached magistrate. Dr. Soderstrand urges inquiry by this Court into the extent to which the First Amendment must bear upon the *Leon* inquiry

into the actions of the police officers in being reasonably precise in drafting affidavits in support of search warrants.

As this Court has stated, "where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.'" *Zurcher v. Stanford Daily, et al.*, 436 U.S. 547, 564 (1978). In addition, this Court has recognized that the Constitution gives "significant protection from the overbroad laws that chill free speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002).

Ashcroft is particularly germane to the issue raised by Dr. Soderstrand because in that case this Court invalidated a federal statute dealing with child pornography on the basis of overbreadth. Dr. Soderstrand posits that to the extent the Congress must be held to strict constitutional standards in drafting legislation, so too must police officers be held to strict standards in drafting affidavits in support of search warrants which seek materials presumptively protected by the First Amendment. This Court has "long recognized" that the seizure of items such as books or films (or in the modern age, compact discs or other computer data storage media) "implicates First Amendment concerns not raised by other kinds of seizures." *P.J. Video*, 475 U.S. at 873.

This Court has demanded several "certain special conditions be met before such seizures may be carried out." *Id.*; *see, e.g., Roaden v. Kentucky*, 413 U.S. 496 (1973) (police may not rely upon the "exigency" exception to the Fourth Amendment's warrant requirement in conducting a seizure of allegedly obscene materials where the result would be a prior restraint); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964) (large-scale seizures of books or films constituting

a prior restraint must be preceded by an adversary hearing on the question of obscenity); *Marcus v. Search Warrant*, 367 U.S. 717 (1961) (same); *Heller v. New York*, 413 U.S. 483 (1973) (requiring that in cases where evidence is being preserved for trial, the seizure must still be made pursuant to a warrant and followed by an opportunity for a prompt post-seizure judicial determination of obscenity); *Lee Art Theatre, Inc. v. Virginia,* 392 U.S. 636 (1968) (a search warrant authorizing the seizure of materials presumptively protected by the First Amendment may not issue based solely upon the conclusory allegations of a police officer that the sought-after materials are obscene, but instead must be supported by affidavits setting forth specific facts in order that the issuing magistrate may "focus searchingly on the question of obscenity").

In *P.J. Video*, this Court noted that there is no constitutional requirement that a magistrate *actually view* allegedly obscene materials prior to issuing a warrant authorizing their seizure. *Id.* at 874 n.5. Such a state of the law counsels *strongly* in favor of tempering *Leon* in First Amendment cases because, as this Court noted, a reasonably specific affidavit describing the content of the materials sought to be seized generally provides the magistrate with an adequate basis upon which to determine the question of probable cause. *Id.* Thus, to the extent that in such cases—where the First Amendment is implicated—the drafting skills of the police officer are instrumental in assisting the magistrate to make the probable cause determination, "good faith" reliance by the officer on the magistrate's probable cause determination is marginal because the officer himself has skewed the determination in the first instance.

Delineating the constitutional safeguards required in this area is topical and necessary as the FBI, state and local law

enforcement devote more and more resources to address the problems of obscenity and child pornography, particularly as it involves the internet. James H. Burruss, Deputy Assistant Director, Criminal Investigation Division Federal Bureau of Investigation, outlined the scope of the problem and the response of law enforcement before the United States Senate on January 19, 2006.[6] Aggressive law enforcement efforts in this area will necessarily result in a marked increase in the number of search warrants requested and a corresponding increase in the number of affidavits drafted by police officers. Guidelines from this Court concerning the extent to which *Leon* impacts such cases are needed and the Petition for a Writ of Certiorari should be granted in this case to address the issue directly.

III. *BOOKER* REQUIRES A LIMITED REMAND

This Court has decided a string of cases requiring that certain fact-finding be performed by a jury pursuant to the Sixth Amendment if such fact-finding results in an increase in punishment. *See, e.g., Jones v. United States*, 526 U.S. 227 (1999) (holding that the Sixth Amendment requires that any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (extending *Jones* to the States *via* the Fourteenth Amendment); *Blakely v. Washington*, 542 U.S. 296 (2004) (applying *Apprendi* to a state court sentencing scheme); *Ring v. Arizona*, 536 U.S. 584 (2002) (extending *Jones* and

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[6] *See* http://www.fbi.gov/congress/congress06/burruss011906.htm (Statements by James H. Burruss Before the Senate Committee on Commerce, Science and Transportation January 19, 2006).

Apprendi to capital sentencing schemes in state courts); and *United States v. Booker*, 543 U.S. 220 (2005) (invalidating the Federal Sentencing Guidelines to the extent that they are inconsistent with the Sixth Amendment).

In the wake of *Booker*, the circuit courts of appeals have been inconsistent in the application of plain error where a *Booker* error is clearly present. The Tenth Circuit has applied plain error analysis with a strong preference against remanding to the District Court for re-sentencing. *See United States v. Gonzalez-Huerta*, 403 F.3d 727 (10th Cir. 2005) (*en banc*); *United States v. Soderstrand*, 412 F.3d 1146, 1154-56 (10th Cir. 2005).

In contrast, several other circuits have developed a mode of analysis of *Booker* claims that involve a clear policy mandate that the best way to deal with unpreserved *Booker* error in the mandatory application of the Guidelines is to "ask the person who knows the answer, the sentencing judge." *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (*en banc*); *see also United States v. Coles*, 403 F.3d 764 (D.C.Cir. 2005); *United States v. Crosby*, 397 F.3d 103 (2nd Cir. 2005); *United States v. Pennell*, 409 F.3d 240 (5th Cir. 2005); *United States v. Morgan*, __ F.3d __, 2006 WL 176603 (6th Cir., January 26, 2006); *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005).

The strict analysis engaged in by the Tenth Circuit in which it resolves the large majority of *Booker* cases without remand to the District Court does not adequately vindicate the Sixth Amendment rights of a litigant such as Dr. Soderstrand. The approach by the other circuits cures such error in the best way possible, by returning the question back to the sentencing court. The Tenth Circuit's aversion to doing this *prejudices* litigants such as Dr. Soderstrand because the method of

analysis engaged in by the Tenth Circuit involves a review of the record below that was not prepared for developing facts suitable for such a review.

In other words, the Tenth Circuit analyzes the record to determine if the sentencing court would have imposed the same sentence or imposed a lesser sentence. But a litigant such as Dr. Soderstrand was not put on notice at the time of the hearing to develop the record in that manner; and the record rarely contains strong indications either way. In Dr. Soderstrand's case, the District Court imposed sentence by relying upon facts not found by a jury and under the impression that the Guidelines were mandatory. Dr. Soderstrand is entitled to a re-sentencing under proper constitutional standards and in nearly every other circuit but the Tenth Circuit he would have received such a re-sentencing hearing. Thus, this Court must exercise its superintending control over the federal courts and give direction concerning the proper role and scope of plain error review in cases containing *Booker* error.

CONCLUSION

For the reasons stated above, the Petitioner prays respectfully that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit issued in this case June 16, 2005.

DATED this 30th day of January, 2006.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 04-6024

[Filed September 26, 2005]

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
v.	)
MICHAEL A. SODERSTRAND, Defendant-Appellant.	)

ORDER

Before O'Brien, Holloway, and Tymkovich, Circuit Judges.

Appellant's motion for clarification of this court's September 1, 2005 order is granted. The order is amended as follows:

Appellant's petition for panel rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active

service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
Clerk, Court of Appeals

/s/_____
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 04-6024

[Filed June 16, 2005]

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
v.	)
MICHAEL A. SODERSTRAND, Defendant-Appellant.	)

OPINION

HOLLOWAY, Circuit Judge.

Dr. Michael A. Soderstrand, an Oklahoma State University professor, was charged with possessing child pornography, based on material found in a safe he kept in a supply room at work, and subsequently on other material found during a search of Dr. Soderstrand's laptop and desktop computers and computer files stored on disk. The United States District Court for the Western District of Oklahoma denied Dr. Soderstrand's motion to suppress the evidence found in the safe, and upon Dr. Soderstrand's subsequent

guilty plea, sentenced him to 35 months' incarceration. Dr. Soderstrand now appeals from his conviction on his conditional plea of guilty, alleging error in the denial of his suppression motion. He also appeals, pursuant to *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004), from his sentence challenging the validity of the district court's factual findings in sentencing. *United States v. Booker*, 160 L. Ed. 2d 621, 125 S. Ct. 738 (2005), which applies *Blakely* to the federal sentencing guidelines, was decided the day after oral argument before us in Dr. Soderstrand's case and *Booker*'s holding is also applicable here. For reasons discussed below, we affirm the rulings below in all respects.

I. Background

Dr. Soderstrand was head of the Electrical Engineering Department at Oklahoma State University (OSU). On July 3 or 4, 2002, Doris Al-Harake, a clerical employee in the same department, observed a gray, fireproof safe behind a punch bowl on some boxes in a department supply room. Aplt. App. at 11. Al-Harake claims that the key was in the lock of the safe when she found it, although Dr. Soderstrand disputes this contention. *Id.* Al-Harake also stated that an informal inquiry had been conducted by the Department earlier in the year to try to ascertain who owned it, but to no avail. Id.

On this occasion, Ms. Al-Harake decided to open the safe, ostensibly to determine who owned it. Inside she found three compact disks, five Polaroid photos, twenty-seven 35mm photos, four personal letters and sixty-three 3.5mm computer diskettes. Aplt. App. 15, 16. Three of the letters were marked as addressed to "Michael" or "Dr. Michael Soderstrand," or signed as "M. Soderstrand." *Id.* There were also two photos

of Dr. Soderstrand. After opening the safe and observing the contents, Al-Harake decided to remove one of the CDs and view its contents on her office computer. On it she found an image that appeared to be several nude Asian children about 10-12 years old. *Id.*

Al-Harake returned the disc to the safe in the supply room and subsequently attempted to anonymously notify OSU authorities about the contents of the safe. She sent two emails under false names to Karl Reid, Dean of the College of Engineering, in which she alleged that Dr. Soderstrand kept child pornography in a safe in the storage room next to his office. Aplt. App. 14, 17, 18. Reid received the emails on July 8 and notified campus police chief Everett Eaton. *Id.* The next day, Eaton dispatched Officer Larry Crites to meet with Dean Reid at the College of Engineering. Officer Crites and another college official retrieved the safe from the supply room and locked it in the evidence locker at the campus police department. Aplt. App. at 12, 15. The next day, July 10, 2002, Officer Crites signed an affidavit in support of a search warrant for a state magistrate judge, in which he stated:

> On the CD Al-Harake saw a [sic] image (photo) with several Asian persons that appeared to Al-Harake to be around 10-12 years of age. In the image the Asian children were nude and did not have any pubic hair on their genital area.

Aplt. App. at 53. Based upon this information, the magistrate authorized a search warrant on July 10, 2002, and Crites called the OSU Key Shop, which opened the safe and disclosed the contents. Aplt. App. at 13, 16. The contents of the safe then formed the evidentiary basis for subsequent investigation and prosecution of Dr. Soderstrand.

On March 19, 2003, prosecutors obtained a 13-count indictment of Dr. Soderstrand for possession of computer disks and other material containing images of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). Following the indictment, Dr. Soderstrand moved to suppress the evidence yielded by the search of the safe. By Order entered on July 23, 2003, the district court denied Dr. Soderstrand's suppression motion. Dr. Soderstrand then entered a conditional plea of guilty, waiving his right to appeal but reserving his right to challenge the denial of his motion to suppress in this appeal from his conviction and sentence. Aplee. Supp. App. at 13-21.

At a combined plea and sentencing hearing, Dr. Soderstrand objected to paragraphs 24 and 25 of the Pre-Sentence Report, which recommended sentencing enhancements because the material involved minors under the age of 12, and because Dr. Soderstrand possessed ten or more images of child pornography. Aplt. App. at 89-92. The Government presented evidence through the testimony of Mark McCoy, Deputy Inspector with the Oklahoma State Bureau of Investigation (OSBI) computer crimes unit. Aplt. App. at 93-94. McCoy testified he found approximately 2,700 images of child pornography on Dr. Soderstrand's CDs, laptop and desktop computers. Aplt. App. at 95-96. Of these, the IBM computer contained 176 images, the laptop contained 226 images; and the two CDs contained 2500 images in 24 folders. Aplt. App. at 96-97. Upon completion of the sentencing hearing, the district court sentenced Dr. Soderstrand to 35 months' incarceration, three years' supervised release, 104 hours of community service and a special assessment of $100. Aplt. App. at 141-148.

II. Jurisdiction

The United States District Court for the Western District of Oklahoma had jurisdiction pursuant to 18 U.S.C. § 3231 because Dr. Soderstrand was charged with violating the federal child pornography statute. Dr. Soderstrand entered a conditional plea pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, retaining limited rights to appeal his conviction and sentence.[1] The district court denied Dr. Soderstrand's motion to suppress on July 23, 2003. The resulting conviction and sentence entered following the guilty plea constitutes a final decision from which appeal to this court is proper pursuant to 28 U.S.C. § 1291. Dr. Soderstrand filed a timely notice of appeal on January 16, 2004. This court is thus vested with jurisdiction to hear this appeal. *See United States v. Rosborough*, 366 F.3d 1145, 1147 (10th Cir. 2004).

III. Discussion

A. The motion to suppress the contents of the safe

The district court denied Dr. Soderstrand's motion to suppress the contents of the safe, concluding that the police properly obtained a warrant to search the safe after acting upon a tip from Al-Harake, who had observed the safe's contents. The court rejected Dr. Soderstrand's contention that Al-Harake's initial search of the safe violated the Fourth

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[1] While Dr. Soderstrand agreed to waive appeal of aspects of his conviction and sentence, nevertheless, he retained the right to appeal the district court's denial of his suppression motion. Aplt. App. at 84. Also, the Government concedes that Dr. Soderstrand may appeal the constitutionality of his sentencing under *Blakely* and *Booker*, for plain error review. Aplee. Br. at 24.

Amendment, concluding that although Al-Harake was employed by a state university, she was acting as a private person, not on behalf of the Government or the State, when she first opened the safe and perused its contents. The district court also concluded that even if the search warrant was not constitutionally valid, it was not so facially invalid that the police could not have reasonably relied on it and acted in good faith by searching the contents of the safe pursuant to it.

In reviewing the denial of a motion to suppress, this court views the evidence in the light most favorable to the prevailing party and accepts the district court's factual findings unless clearly erroneous. *United States v. Jackson*, 381 F.3d 984, 988 (10th Cir., 2004). The ultimate determination of reasonableness under the Fourth Amendment, however, is reviewed de novo. *Id.* This court also reviews de novo the district court's legal conclusions regarding the sufficiency of the search warrant. *United States v. Campos*, 221 F.3d 1143, 1146 (10th Cir. 2000).

We will now set out the substance of Dr. Soderstrand's objections to the validity of the search warrant and the evidence its execution produced. Dr. Soderstrand argues that the search warrant was facially deficient because it alleged only that the CD contained in the safe depicted nude children. The statutory definition of child pornography we are concerned with requires that images depict minors engaged in sexually explicit conduct, such as graphic or simulated lascivious exhibition of the genitals or pubic area. 18 U.S.C. § 2256(2)(B)(iii). It is true that other circuits have concluded that depictions of mere nudity is not sufficient to constitute child pornography; rather, the nudity must be depicted in a lascivious manner in order to be criminal. *See United States v. Horn*, 187 F.3d 781, 789 (8th Cir. 1999) (nudity alone does not suffice; there must be both an "exhibition" of the

genital area and such exhibition must be lascivious); *United States v. Villard*, 885 F.2d 117, 124 (3rd Cir. 1989) (noting that the statute requires more than mere nudity because the phrase "exhibition of the genitals or pubic area" in § 2256(2)(E) is qualified by the word "lascivious."). As a result, Dr. Soderstrand urges the warrant did not allege that the safe contained evidence of an actual crime, only that it contained an image which, absent further description, was not presumptively illegal to possess, and arguably was even protected by the First Amendment.

Dr. Soderstrand further argues that the impetus for and sole source of information supporting the search warrant were the observations of Al-Harake, which were relayed first to Dean Reid, and then by Reid to Officer Crites. According to Dr. Soderstrand, Officer Crites's reliance on Reid's representation of Al-Harake's observations was nothing more than "third party hearsay" (Aplt. Br. at 6) and insufficient to support a search warrant.

Finally, Dr. Soderstrand argues, the basis for Al-Harake's observation was her own allegedly unconstitutional search of the safe. Al-Harake was an employee of Oklahoma State University, which is funded and administered by the State of Oklahoma. Dr. Soderstand urges that this means Al-Harake was a state actor. Further, Dr. Soderstand argues that he had a reasonable expectation of privacy regarding the contents of the safe; he analogizes the safe to a purse or a briefcase, for which the Supreme Court recognized in *O'Connor v. Ortega*, 480 U.S. 709, 716, 94 L. Ed. 2d 714, 107 S. Ct. 1492 (1987) a heightened expectation of privacy, even in the workplace

context.[2] As a result, Dr. Soderstrand argues that the above factors rendered the search warrant that was later issued by the magistrate judge so lacking in probable cause that officers could not claim reasonable reliance on it under the "good faith" exception recognized in *United States v. Leon*, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984).

We are not persuaded by Dr. Soderstrand's arguments, which we have noted above. Even if we assume that Dr. Soderstrand had a reasonable expectation of privacy in the safe, which he never identified as belonging to him and which he left unattended in a common storage room accessible to a number of employees, we find that Al-Harake was not a state actor in her initial search of the safe, and the later search of the safe by law enforcement officers was supported by a valid search warrant or the officers' good faith reliance on that warrant under *Leon, supra*.

An affidavit establishes probable cause for a search warrant if the totality of the information it contains establishes the "fair probability that contraband or evidence of a crime

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[2] Specifically, the Court noted:

> Not everything that passes through the confines of the business address can be considered a part of the workplace context, however. An employee may bring closed luggage to the office prior to leaving on a trip, or a handbag or briefcase each workday. While whatever expectation of privacy the employee has in the existence and the outward appearance of the luggage is affected by its presence in the workplace, the employee's expectation of privacy in the *contents* of the luggage is not affected in the same way.

Id. (emphasis in original).

will be found in a particular place." *See United States v. Rice*, 358 F.3d 1268, 1274 (10th Cir. 2004). Although we review the district court's ruling on the sufficiency of the search warrant de novo, we do not review the issuing judge's determination of probable cause de novo. Instead, this court grants the magistrate's determination of probable cause "great deference" such that we ask only "whether the issuing magistrate had a 'substantial basis' for determining probable cause existed." United States v. Le, 173 F.3d 1258, 1265 (10th Cir. 1999); *United States v. Wittgenstein*, 163 F.3d 1164, 1172 (10th Cir. 1998).

The affidavit in question indicated that Al-Harake had opened the safe and examined its contents, that the safe contained photographs and computer disks, that on one of the computer disks was an image of naked children, that Al-Harake contacted the Dean, and the Dean contacted the police. This was sufficient for the issuing judge to reasonably conclude that images of child pornography might reasonably be expected to be contained within the computer disks, CDs or other data storage devices contained in the safe. Neither *Horn*, 187 F.3d *supra*, nor *Villard*, 885 F.2d *supra*, are apposite to this case, because both of those cases involved the quantum of evidence at trial. As the Supreme Court noted in *Illinois v. Gates*, 462 U.S. 213, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983):

"the quanta. . . of proof" appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, numerically precise degree of certainty corresponding to "probable cause" may not be helpful, it is clear that "only the probability, and

not a prima facie showing, of criminal activity is the standard of probable cause."

Id. at 235 (citations omitted).

We also find without merit Dr. Soderstrand's argument that Al-Harake was a Government actor whose initial search of the safe violated Dr. Soderstrand's Fourth Amendment rights. While Al-Harake may be an employee of the Government due to her State employment at OSU, she was in this case acting solely on her own account. To determine whether a private person's search becomes a Government search, the court examines "(1) whether the Government knew of and acquiesced in the intrusive conduct, and (2) whether the person searching intended to assist law enforcement efforts or to further his [or her] own ends." *United States v. Souza*, 223 F.3d 1197, 1201 (10th Cir. 2000). Dr. Soderstrand does not contend that law enforcement officers coerced, dominated or directed Al-Harake, or that she otherwise conducted her search pursuant to any law enforcement or other governmental objective. Rather, as he admits, "Al-Harake simply became curious about the safe and its contents." Aplt. Br. At 19.

Finally, even if the search warrant was not valid, the police officers who acted on the warrant nonetheless did so in good faith. When officers execute a search warrant in reasonably good faith reliance on its validity, evidence obtained through the warrant will not be suppressed even if the search warrant is ultimately determined to be invalid. *See Leon*, 468 U.S. *supra* at 922. "Just as reviewing courts give 'great deference' to the decisions of judicial officers who make probable cause determinations, police officers should be entitled to rely upon the probable-cause determination of a neutral magistrate when defending an attack on their good

faith for either seeking or executing a search warrant." *United States v. Tuter*, 240 F.3d 1292, 1300 (10th Cir. 2001) (citation omitted).

Here, the police did everything they were supposed to do. They were made aware that there may be evidence of a crime (possession of child pornography) contained in the safe. Rather than opening it immediately, they secured it, presented the information they had available to a neutral magistrate, and finally conducted a search of the safe only upon the magistrate's approval. Dr. Soderstrand introduced no countervailing evidence of any bad faith conduct by the police officers in question. As a result, even were Dr. Soderstrand's objections sufficient to cast doubt on the validity of the search warrant, he would not be entitled to the exclusionary remedy he seeks.

B. The Constitutionality of Dr. Soderstrand's Sentence

The district court below, rather than a jury, made the following findings of fact in the course of its sentencing determination: (1) the material involved prepubescent minors or minors under the age of 12 years; (2) the offense involved possessing ten or more books, magazines, periodicals, films, videotapes, or other items, containing a visual depiction involving the sexual exploitation of a minor; and (3) a computer was used for the transmission of the material.[3] On appeal, Dr. Soderstrand argues that he did not admit to any of

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[3] As we explain, each of these findings of fact carried with them a two level enhancement under the Federal Sentencing Guidelines. The district court also found an off-setting two level reduction applicable to Dr. Soderstrand, on the basis that he accepted responsibility for his actions. This finding is not at issue on appeal.

these findings. Aplt. Br. at 28. However, in his guilty plea, Dr. Soderstrand admitted "knowingly possessing computer disks and material containing images of child pornography that had been mailed, shipped or transported in interstate or foreign commerce by any means, including by computer." Aplt. App. at 141. We find that this amounts to an admission to the substance of the third finding - that a computer was used in the transmission of the material.[4]

Dr. Soderstrand objected below to the Pre-Sentence Report findings, later adopted by the district court, which concerned the age of the minors depicted in the material he possessed, and the quantity of material he possessed. Aplt. App. at 90-91. He did not argue below, however, that the district court's findings of fact on these or any other issues violated his Sixth Amendment rights. Taking into account the facts admitted by Dr. Soderstrand, but excluding the contested facts regarding the age of the minors and the quantity of material, Dr. Soderstrand would have been subject to a total offense level of 15. In a case such as his, where there is no prior criminal record, this offense level would have had a guideline sentencing range of 18-24 months. Considering all the district court's findings, however, Dr. Soderstrand was subject to a total offense level of 19, with a resulting sentencing range of 30-37 months. The district court sentenced Dr. Soderstrand within this latter range, to a total of 35 months' incarceration.

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[4] We note that not only does Dr. Soderstrand admit by the plain language of his plea that the material was transmitted "by any means, including by computer," but that virtually all of the evidence against Dr. Soderstrand was in the forms of computer files and computer disks. Dr. Soderstrand raised no objection below to any portion of the PSR which stated that the material in question was tr nsmitted by computer.

For the first time on appeal, Dr. Soderstrand argues that this sentence violated his Sixth Amendment right to a jury trial, pursuant to *Blakely v. Washington*, 125 S. Ct. *supra*. *See also United States v. Booker*, 125 S. Ct. *supra*; *United States v. Gonzalez-Huerta*, 403 F.3d 727 (10th Cir. 2005) (en banc). Because he failed to raise this issue below, we review the district court's sentencing determination for plain error. *Gonzalez-Huerta*, *supra* at 732. "Plain error occurs when there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id*. *See also United States v. Olano*, 507 U.S. 725, 732, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993). We apply this analysis "less rigidly when reviewing a potential constitutional error." *United States v. Dazey*, 403 F.3d 1147, 1174 (10th Cir. 2005).

Here there is error and it is plain. A more difficult question follows under the third prong of *Olano*, as applied in *Gonzalez-Huerta* and subsequent cases - whether the error affected Dr. Soderstrand's substantial rights. We have held that a defendant may make this showing in at least two ways:

> First, if the defendant shows a reasonable probability that a jury applying a reasonable doubt standard would not have found the same material facts that a judge found by a preponderance of the evidence, then the defendant successfully demonstrates that the error below affected his substantial rights... Second, a defendant may show that the district court's error affected his substantial rights by demonstrating a reasonable probability that, under the specific facts of his case as analyzed under the sentencing factors of 18 U.S.C. § 3553(a), the district court judge would

> reasonably impose a sentence outside the Guideline range.

Dazey, 403 F.3d at 1175 (footnote omitted). The defendant bears the burden to establish that his substantial rights were affected to satisfy the third *Olano* prong. *Dazey*, *supra*.

Dr. Soderstrand does not argue that the district court would have imposed a lesser sentence under the facts it found, had the judge been aware of his discretion to do so. In order to demonstrate that the error here affected his substantial rights (to satisfy the third prong of *Olano*), Dr. Soderstrand must therefore show a reasonable probability that a jury applying a reasonable doubt standard would have found either that he did not possess more than ten images which met the standard for child pornography under 18 U.S.C. § 2256(2)(B)(iii), or that none of the images he possessed were of a child under 12, or that if he did possess any images of children under 12, those images did not meet the standard for child pornography under 18 U.S.C. § 2256(2)(B)(iii).

Before the district court, Dr. Soderstrand did not introduce any affirmative evidence which would have supported any of these contentions. Rather, Dr. Soderstrand argued principally that the Government failed to prove the element of "lasciviousness" necessary for an image or depiction to constitute child pornography under the statute and as explained by *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986); *accord United States v. Wolf*, 890 F.2d 241, 245 (10th Cir. 1989) (applying the *Dost* factors to the term "lascivious"). The Government, by contrast, contends that the evidence and testimony it introduced was "overwhelming," and that "any fact-finder, under any standard would have reached the same sentencing

determinations that the district court did at sentencing." Aplee. Br. at 31, 33.

Ultimately, we need not reach a decision on the third *Olano* prong - whether Dr. Soderstrand's substantial rights were affected. Even assuming that Dr. Soderstrand could show that the sentencing below affected his substantial rights, we find that Dr. Soderstrand has not met his "burden of persuading us that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings," *United States v. Mozee*, 405 F.3d 1082, 1091 (10th Cir. 2005), thus failing to satisfy the fourth prong of *Olano*. As we have explained, in the context of a constitutional *Booker* error "the question before us is whether a reversal and remand for resentencing by the district court under a discretionary guidelines regime would advance the fairness, integrity or public reputation of the courts." *Mozee*, 405 F.3d *supra* at 1091. "Courts have held that sentencing error meets the fourth prong of plain-error review only in those rare cases in which core notions of justice are offended." *Gonzalez-Huerta*, 403 F.3d *supra* at 739.

Here the district court determined that the guideline range applicable to Dr. Soderstrand's offense was 30-37 months. It sentenced him toward the upper end of that range, imposing a sentence of 35 months. The district judge stated that he chose not to sentence Dr. Soderstrand to the maximum penalty because there was no evidence Dr. Soderstrand had exchanged or trafficked in any of the pornographic material, rather than simply possessing it for his own use, and because Dr. Soderstrand had otherwise had an "outstanding career" with no evidence of any past misconduct. Aplt. App. at 133. However, the judge did not sentence Dr. Soderstrand to the minimum or close to the minimum penalty under the guideline range, either. He noted that child pornography is produced for profit, and the reason why it can be made for profit is

because people like Dr. Soderstrand will view it. *Id.* at 132. The judge emphasized the "many victims" ultimately impacted by Dr. Soderstrand's conduct, with the "saddest of all" being the many young children who were abused in the making of the pornographic material Dr. Soderstrand was convicted of possessing. *Id.* As a result, the judge stated he believed a sentence of 35 months' incarceration was appropriate. *Id.* at 133.

Thus the district judge exercised his discretion and determined that a sentence of 35 months was appropriate, although he obviously could have sentenced Dr. Soderstrand to a lesser term of imprisonment. Accordingly, "there is no basis for us to assume [Dr. Soderstrand] would receive a lesser sentence if he were resentenced under a discretionary sentencing regime in which the district court is required to 'consider' the guidelines when it exercises its discretion." *Mozee*, 405 F.3d *supra* at 1092. Dr. Soderstrand has failed to establish that there is an appearance of unfairness in his sentence, and accordingly, he has failed to satisfy the fourth prong of *Olano*. We therefore decline to exercise our discretion to notice the *Booker* constitutional error here.

Accordingly, the conviction and sentence of the district court are **AFFIRMED**.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CR-03-59-L

[Filed July 23, 2003]

UNITED STATES OF AMERICA, Plaintiff,	)
v.	)
MICHAEL A. SODERSTRAND, Defendant.	)

ORDER

The defendant, Michael A. Soderstrand, is charged in a thirteen count indictment returned March 19, 2003 with violating 18 U.S.C. § 2252A(a)(5)(B), which makes it a federal crime for anyone to knowingly possess computer disks and other material that contain images of child pornography that were produced using materials that had been mailed, shipped, and transported in interstate or foreign commerce by any means, including by computer. This matter is before the court on defendant's Motion to Suppress Evidence. The government has responded to the motion and defendant also filed a reply brief. After reviewing the briefs, the court advised the parties in open court of its denial of defendant's

Motion to Suppress. This written order memorializes the court's ruling.

As summarized by defendant, the charges in this case stem from evidence seized during a police search of defendant's safe on July 10, 2002. At the time of the search, defendant was a professor at Oklahoma State University and the safe was located in an area near his office. The search was authorized by a warrant issued by a Payne County district court judge based upon information contained in an affidavit signed on July 10, 2002 by an Oklahoma State University Police Department investigator. Defendant asserts that the "bare bones" affidavit lacks sufficient facts and evidence to establish probably cause that evidence of child pornography would be found in the safe.

The Affidavit for Search Warrant, attached as Exhibit 2 to defendant's Motion to Suppress, is based in pertinent part on the following facts as recited in paragraph 3:

> On July 9, 2002, this investigator m[e]t with Dean Karl Reid. Reid is the Dean of the College of Eng. Arch. And Tech. Administration. Reid told this investigator that on July 3 or July 4, 2002 Doris Al-Harake went into room 205 Eng. South to get supplies for her work. Room 205 is a supply room for the Electrical and Computer engineering. Everyone in the Engineering Dept. has access to this room. Al-Harake observed a gray fireproof safe sitting behind a punch bowl on some boxes. The key to the safe was in the safe's lock. Since no one knew who the safe belonged to she opened the safe and looked through the contents. Al-Harake took a computer CD from the safe and viewed the CD in an attempt to learn who the owner was. On the CD Al-Harake saw a Image

> (photo) ... with several Asian persons that appeared to Al-Harake to be around 10-12 years of age. In this image the Asian children nude [sic] and did not have any pubic hair on their genital area. At this point Al-Harake removed the CD from her computer and placed the CD back in the fireproof safe.

The Search Warrant, attached as Exhibit 1 to defendant's Motion to Suppress, authorized the following:

> Search the contents of one gray fireproof save for computer CD's which child pornography on the CD's. View, open, copy, run, execute any electronic computer CD's, 3.5 computer disk, any zip drive, thumb drives, memory cards located within the gray fireproof safe. View any other material that might contain child pornography within the save.

Defendant argues that the search warrant is invalid because there are insufficient facts contained in the affidavit to establish that the apparently nude minors depicted in the CD image were engaged in sexually explicit conduct or depicted in a sexually explicit way at all. Defendant points out that under 18 U.S.C. §2256, which is substantially identical to the statute under which defendant is charged, for an image or depiction to qualify as child pornography it must be established that the image depicts a minor engages in sexually explicit conduct. "Sexually explicit conduct" is defined as graphic or simulated lascivious exhibition of the genitals or pubic area of any person. 18U.S.C. §2256(2)(B)(iii).

In determining whether probable cause exists to issue a search warrant, the issuing judge must decide whether, given the totality of the circumstances, "'there is a fair probability

that contraband or evidence of a crime will be found in a particular place.'" United States v. Janus Indus., 48 F.3d 1548, 1552 (10th Cir. 1995), *quoting* Illinois v. Gates, 462 U.S. 213, 238 (1983). Great deference is given to the issuing judge's determination and it will be upheld as long as the judge had a substantial basis for finding that probable cause existed. Janus, 48 F.3d at 1553.

Upon consideration of the facts presented in the Affidavit for Search Warrant, the court concludes that the information conveyed was sufficient for the state court district judge to determine that there was a fair probability that evidence of child pornography could be found in the safe. In considering the totality of the circumstances and the deference to be afforded to the decision of the issuing judge, the court finds that the issuing judge properly concluded that there was probable cause to believe that evidence of child pornography would be found in the safe. Accordingly, the search warrant should not be invalidated on the grounds that it was not supported by a sufficient factual basis and the Motion to Suppress on this issue should be denied.

Alternatively, the court agrees with the government that the Motion to Suppress may be denied on the grounds that the good faith exception to the exclusionary rule applies. United States v. Leon, 468 U.S. 897 (1984); United States v. Rowland, 145 F.3d 1194, 1206 (10th Cir. 1998). The court finds that the Affidavit for Search Warrant was not so lacking in indicia of probable cause that the executing officers should have know the search was illegal despite the state magistrate's authorization. *See* Leon, 468 U.S. at 922.

Next, the court turns to defendant's argument that the evidence should be suppressed because the search conducted by Doris Al-Harake, acting as a state actor, was

unconstitutionally overbroad. In this connection, defendant argues that when Al-Harake conducted the search of the safe, she was serving a function of he College of Electrical and Computer Engineering relating to her state employment. Thus, defendant claims Al-Harake was acting under color of state law in the pursuit of her official function, *i.e.*, she was acting as a "state actor" for Fourth Amendment purposes. The court disagrees.

In United States v. Souza, 223 F.3d 1197, 1201 (10th Cir. 2000), the Tenth Circuit Court of Appeals stated:

> The Fourth Amendment protects citizens against unreasonable searches and seizures by government actors. *See* Burdeau v. McDowell, 256 U.S. 465, 475, 41 S.Ct. 574, 65 L.Ed. 1048 (1921). However, the Fourth Amendment does not apply to searches by private parties absent governmental involvement in the search. *See* [United States v.] Humphrey, 208 F.3d [1190,] 1203 [(10th Cir. 2000)]. A search by a private person becomes a government search "if the government coerces, dominates, or directs the actions of the private person" conducting the search. Pleasant v. Lovell, 876 F.2d 787, 796 (10th Cir. 1989). In such cases, "the private citizen may be regarded as an agent or instrumentality of the police and the fruits of the search may be suppressed." United States v. Smythe, 84 F.3d 1240, 1242 (10th Cir. 1996).
>
> In determining whether a search by a private person becomes a government search, the following two-part inquiry is utilized: 1) whether the government know of and acquiesced in the intrusive conduct, and 2) whether the party performing the search intended to assist law enforcement efforts or

tho further his own ends." Pleasant, 876 F.2d at 979 (citations and quotations omitted). Both prongs must be satisfied before the private search may be deemed a government search. *See* United States v. Leffall, 82 F.3d 343, 347 (10th Cir. 1996). The totality of the circumstances guides the court's determination as to whether the two-part inquiry has been met. *See* Smythe, 84 F.3d at 1243.

In applying this analysis to the facts presented, the court determines that under the totality of the circumstances, there is insufficient evidence of a level of governmental involvement that would transform Ms. Al-Harake's search of the safe into a government search for purposes of the Fourth Amendment. There is no evidence that the government coerced, dominated, or directed Al-Harake's actions. There is no indication that the government know of or acquiesced in her actions. Likewise, the evidence fails to show that Al-Harake were not a search within the meaning of the Fourth Amendment, and defendant's Motion to Suppress on this issue should also be denied.

In conclusion, defendant's Motion to Suppress **[Doc.No.22]** is **DENIED** in its entirety.

It is so ordered this 23rd day of July, 2003

/s/ _____
Tim Leonard
United States District Judge